IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

## No. 317

CRITES, INCORPORATED,

*Petitioner,*

*vs.*

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, RICHARD SIMKINS AND GEORGE FLORENCE,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

## PETITIONER'S REPLY BRIEF.

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## PETITIONER'S REPLY BRIEF.

*Fee-splitting agreement.*

The respondents attempt to make it appear that the fee-splitting agreement made between Ingalls, one of the attorneys for the plaintiff (Prudential), and Simkins, one of the receivers of the property under foreclosure, was limited to the original retainer fee of $1,100 received by Ingalls from Prudential. It is euphemistically stated that Simkins received half of this fee as a "forwarder." But the full scope of the fee-splitting agreement was revealed by Ingalls himself, as follows (R. 113-114):

"Q. Did you (Ingalls) have any understanding with Mr. Simpkins as to the participation of fees re-

ceived either by you or him? A. We had an agreement when we entered into the case that we would divide the fees in this case.

Q. What do you mean by that, "divide the fees in this case"? A. I presumed that he expected to be appointed receiver, and he would receive certain fees there, and I would receive a fee as attorney for the receiver, and we would pool those fees.

Q. You mean by that, Mr. Ingalls, that any fees received in or arising out of this case would be pooled or divided between you? A. That is what I assumed."

*Simkins' secret dealings with Prudential's prospective purchaser.*

The respondents refer to the testimony of Simkins that when the agent of the prospective purchaser came to see him prior to the foreclosure sale and asked him if it was possible to buy the farms as a single unit, Simkins told him that "as receivers we had nothing to do with the sales." Then follows quotation of the testimony of the agent, Jones, to the effect that Simkins told him that he was in no position to offer the land to anybody until after the foreclosure sale.

Simkins' active participation in the negotiations with Jones, prior to the foreclosure sale, is definitely shown by Simkins' letter of June 27, 1933 to Prudential, transmitting the contract of sale (R. 288):

"Please note in particular the manner provided for acceptance of this contract and that it provides that two copies be returned to my office after acceptance. I think everything else has been fully discussed over the telephone. Mr. Simerman and I are fully convinced that Mr. Jones' buyer is as he has stated to us and as we have stated to you over the telephone."

*Conclusions of trial court regarding Simkins' conduct.*

The district court adopted as its own the conclusions of law reported by the special master. (R. 366, 372.) The master concluded (R. 103):

> "That the conduct of Receiver Simkins was objectionable in that it was open to, and did cause criticism which, as an officer of this court, it was his duty to avoid; but that under the circumstances, such conduct constituted no violation of his trust which would justify action by this court in the manner requested in this exception."

*The question at issue.*

The respondents have undertaken to restate the question at issue, as follows:

> "May one of two co-receivers in a foreclosure proceeding, this co-receiver being an attorney, with impunity while acting as such receiver for the collection of rents and profits only, accept legal employment from a real estate agent who is intent upon purchasing the real estate in question from the Prudential Insurance Company of America, the mortgagee, who becomes the purchaser at the marshal's sale; and could said attorney co-receiver accept compensation from this real estate agent without notifying the court, his co-receiver and appellant?" (Respondents' brief, p. 4.)

Passing the fiction of "legal employment from a real estate agent," the question as rephrased by the respondents ignores at least three vital elements: (1) that the dealings of the co-receiver with the agent of the prospective purchaser preceded the foreclosure sale; (2) that the price to be obtained by Prudential from said purchaser was substantially in excess of the mortgage indebtedness;

(3) that the co-receiver failed to make disclosure of the terms of the proposed sale, not only of his commission agreement with Jones, to the court, his co-receiver and the mortgagor.

*Cases cited by respondents.*

The four cases cited by the respondents are not at all in point. None involved a federal receiver, or custodian of property. In none, finally, was there found any element of fraud, concealment or bad faith. In *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587, a director who loaned money to his corporation on the security of a mortgage was permitted to become the purchaser at the trustee's foreclosure sale. In *Allen* v. *Gillette*, 127 U. S. 589, an administrator became the purchaser at a sale of real estate made by a mortgage trustee in the foreclosure of a mortgage made by the decedent's heirs. In *Pewabic Mining Co.* v. *Mason*, 145 U. S. 349, on dissolution of a corporation, stockholders (standing in the relation of tenants in common) were permitted to purchase property of the corporation at a judicial sale held pursuant to a decree of liquidation. And in *Starkweather* v. *Jenner*, 216 U. S. 524, a purchase by syndicate members of syndicate real estate at a trustee's foreclosure sale made under a first mortgage trust deed, was upheld.

* * *

We again respectfully urge that this case merits further review by this court, in furtherance of a high standard of conduct for receivers appointed by the federal court.

Respectfully submitted,

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